Takako Sakao v Ng Pek Yuan & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–99 OF 05 AND W-02–1236 OF 2005
SURIYADI, WAN ADNAN MUHAMAD AND AHMAD MAAROP JJCA
10 DECEMBER 2008

Equity — Property, equitable interest in — Land held on trust for equitable co-owner — Property held on resulting trust for beneficiary — Beneficiary failing to comply with mandatory provisions in National Land Code — Beneficiary unable to register caveat to protect proprietary interest — Whether equity could preserve beneficiary's proprietary interest — Whether beneficiary could obtain relief in personam

Land Law — Indefeasibility of title and interests — Resulting trust — Property held on resulting trust for non-citizen — Failure by non-citizen to comply with mandatory statutory provision — No prior approval in writing obtained by non-citizen from State Authority — Whether non-citizen could caveat interest in trust property — Whether Torrens' system would bar non-citizen from entering caveat — Whether non-citizen could obtain equitable relief to preserve proprietary interest — Whether non-citizen could obtain relief in personam

Land Law — Restraint on dealings — Caveats — Caveatable interest — Whether onus on caveator to establish caveatable interest — Property held on resulting trust for non-citizen — No prior approval in writing obtained by non-citizen from State Authority — Whether non-citizen could present caveat to protect interest in property — Whether non-citizen possessed any caveatable interest — National Land Code ss 433B, 433C

Trusts and Trustees — Resulting trust — Whether sufficient evidence of intention to create resulting trust — Beneficiary and business partner agreeing to purchase property for business venture — Agreement between parties that property purchased would be for joint business venture — Beneficiary contributing towards purchase price — Whether resulting trust over property created in favour of beneficiary

The appellant, a Japanese national and the first respondent decided in 1992 to set up a Japanese restaurant in Malaysia. On 6 March 1993, the first

A respondent purchased a property for RM9.5m for use as a restaurant. A loan from Perdana Finance Bhd was obtained to finance the purchase and a first legal charge over the property was created in favour of Perdana Finance Bhd. The appellant claimed that she had contributed towards the share capital of the restaurant and towards the purchase price of the property. She claimed to B have contributed a sum of RM214,610.48 in total. Sometime in 1994, the appellant discovered that the property was registered solely in the name of the first respondent. The appellant, in order to prevent the first respondent from dealing with the property entered private caveat 13274/94 in December 1994. In March 1996, the appellant's solicitor attempted to enter a second C caveat on the property. This second caveat was rejected by the Registrar on the basis that no caveatable interest was disclosed. On 7 May 1996, the appellant filed a civil suit ('the appellant's suit') against the first respondent, claiming, inter alia, for a declaration that the property was held by the first respondent on trust for the joint beneficial interest of the appellant and first D appellant, an order for the sale of the property with the proceeds distributed accordingly between the first respondent and the appellant, and an injunction restraining the first respondent and/or her agents from selling or in any manner dealing with the property. In July 1996, on the basis of the appellant's suit, a third caveat, 7267/96, was entered against the property. This third E caveat was not registered until much later pending land office clarification. When the appellant realised that the third caveat was not registered immediately, she then entered a fourth caveat, 13038/96. In 2002, a fifth caveat was entered against the property, as caveat 7267/96 had expired. Meanwhile, unbeknown to the appellant, the first respondent in June 1996 F sold the property to one Glamour Land Sdn Bhd ('Glamour'). Glamour then applied for a loan from Malayan Banking Bhd ('MBB') on the security of the property. However, the land office rejected the registration of the memorandum of transfer between the first respondent and Glamour, and the charge between Glamour and MBB, presented on 23 September 1996. On G 12 March 1998, the first respondent filed an originating summons ('OS') against, inter alia, the Registrar and the appellant to remove the caveats lodged. The High Court however ordered the OS be heard together with the appellant's writ. MBB was allowed to enter as second plaintiff in the OS. Both MBB and Glamour were allowed to intervene in the appellant's suit. On H 17 October 2005, the High Court dismissed the appellant's suit and allowed the first respondent's OS. The appellant thus appealed against the dismissal of her suit and the orders made in the first respondent's OS.

I **Held**, dismissing both appeals with costs:

(1) The onus is on the caveator to establish caveatable interest. *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 (followed). In the instant case, the appellant faced a statutory obstacle that she

failed to overcome. The appellant had failed to obtain prior written approval of the State Authority as required under s 433B(1)(c) read together with s 433C of the National Land Code ('Code'). Eventhough the appellant was beneficially entitled to the property under resulting trust, without such approval, and without evidence that the dealing was prior to 1 January 1993, or that her case fell under s 433B(1)(aa), (ab) and (ac), of the Code, her attempt to lodge any caveat was bound to fail. With the appellant's failure to comply with these provisions, she was prohibited from having a caveatable interest under the Code. The caveats had to be removed. The first respondent would be permitted to sell the property to whomsoever she wished (see paras 22 & 23).

(2) The Torrens system was a complete bar to the attempts of the appellant to caveat her interest unless all the strict demands were complied with. Failure to comply with the strict requirements of the amended provision could not be tempered with equity. Nevertheless, this would not exclude the courts' jurisdiction to grant judicial relief in a claim in personam founded in law or in equity (see para 24).

(3) The Court of Appeal would agree with the High Court's finding that a resulting trust was created when the appellant channeled her monies to the first respondent. The first respondent, having persuaded the appellant to part with her monies, was expected to register the appellant as co-owner of the property within the context of the business venture, notwithstanding the fact that the appellant was in Japan and away from the business. The first respondent had further failed to rebut the creation of the resulting trust (see paras 25 & 26).

(4) In the instant case, although a resulting trust had been created, the appellant's share in the property was not successfully established. The appellant's claim would thus have to be confined to the recovery of actual sums of money contributed by her to the first respondent. In this regard, there was sufficient rebuttable evidence to reduce the claimed sum to RM65,450 only (see para 30).

[Bahasa Malaysia summary

Perayu, seorang warganegara Jepun dan merupakan responden pertama memutuskan pada tahun 1992 untuk membuka sebuah restoran Jepun di Malaysia. Pada 6 Mac 1993, responden pertama telah membeli hartanah berharga RM9.5 juta untuk digunakan sebagai restoran. Satu pinjaman daripada Perdana Finance Bhd telah dibuat bagi membiayai pembelian tersebut dan gadaian pertama telah dibuat kepada Perdana Finance Bhd. Perayu mendakwa bahawa beliau telah menyumbang kepada modal saham restoran tersebut dan kepada harga belian hartanah berkenaan. Beliau juga mendakwa telah menyumbang sejumlah RM214,610.48 kesemuanya.

Sekitar tahun 1994, perayu mendapati bahawa hartanah tersebut hanya didaftarkan semata-mata di bawah nama responden pertama. Perayu, dengan tujuan menghalang responden pertama daripada berurusniaga dengan hartanah tersebut telah memasukkan kaveat persendirian 13274/94 pada Disember 1994. Pada Mac 1996, peguamcara perayu cuba untuk memasukkan kaveat kedua ke atas hartanah tersebut. Kaveat kedua ini telah ditolak oleh Pendaftar atas alasan tiada kepentingan yang boleh dikaveat dinyatakan. Pada Mei 1996, perayu memfailkan guaman sivil ('guaman') terhadap responden pertama, menuntut satu deklarasi bahawa hartanah yang dipegang oleh responden pertama atas amanah bagi kepentingan benefisial bersama perayu dan responden pertama, satu arahan untuk menjual hartanah tersebut dan hasil kutipan itu dibahagi sama rata di antara responden pertama dan perayu, dan satu perintah injunksi menghalang responden pertama atau ejen-ejen beliau daripada menjual atau menjalankan urusniaga dengan hartanah tersebut. Pada Julai 1996, berdasarkan guaman sivil perayu, kaveat yang ketiga, 7267/96, telah dimasukkan ke atas hartanah tersebut. Kaveat ketiga ini tidak didaftarkan sehinggalah kemudiannya menunggu penjelasan daripada pejabat tanah. Apabila perayu menyedari bahawa kaveat ketiga tidak didaftarkan, dia memasukkan kaveat keempat, 13038/96, dengan segera. Pada tahun 2002, kaveat kelima telah dimasukkan ke atas hartanah tersebut memandangkan kaveat 7267/96 telah tamat tempoh. Sementara itu, tanpa diketahui oleh perayu, responden pertama, pada Jun 1996 telah menjual hartanah tersebut kepada Glamour Land Sdn Bhd ('Glamour'). Glamour kemudiannya memohon satu pinjaman daripada Malayan Banking Berhad ('MBB') dan hartanah itu dijadikan cagaran. Walau bagaimanapun, pejabat tanah telah menolak pendaftaran memorandum pindah milik antara responden pertama dan Glamour, dan gadaian antara Glamour dan MBB pada 23 September 1996. Pada 12 Mac 1998, responden pertama telah memfailkan saman pemula ke atas Pendaftar dan perayu untuk mengeluarkan kaveat yang telah dimasukkan. Walau bagaimanapun, Mahkamah Tinggi mengarahkan agar saman pemula didengar bersama dengan writ perayu. MBB kemudiannya dibenarkan untuk menjadi plaintif kedua di dalam saman pemula. MBB dan Glamour kedua-duanya dibenarkan untuk mencelah di dalam guaman perayu. Pada 17 Oktober 2005, Mahkamah Tinggi menolak guaman perayu dan membenarkan saman pemula responden pertama. Perayu kemudiannya merayu atas penolakan guamannya dan perintah-perintah dalam saman pemula responden pertama.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Beban pembuktian adalah pada pengkaveat untuk membuktikan kepentingan boleh kaveat. *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 (diikut). Dalam kes ini, perayu menghadapi halangan statutori yang gagal diatasi. Perayu gagal untuk mendapatkan

persetujuan bertulis terlebih dahulu daripada Pihak Berkuasa Negeri sepertimana yang dikehendaki di bawah s 433B(1)(c) dibaca bersama s 433C Kanun Tanah Negara ('Kanun'). Walaupun perayu berhak ke atas hartanah atas amanah berbangkit, tanpa kelulusan dan tanpa bukti yang menunjukkan bahawa urusniaga dijalankan sebelum 1 Januari 1993, atau kesnya terangkum di bawah s 433B(1)(aa),(ab) dan (ac) Kanun tersebut, cubaan perayu untuk memasukkan sebarang kaveat akan gagal. Memandangkan perayu gagal memenuhi peruntukan-peruntukan itu, maka dia dihalang daripada mempunyai kepentingan kaveat di bawah Kanun. Kaveat tersebut hendaklah dipotong. Responden pertama dibenarkan untuk menjual milikan tersebut kepada sesiapa sahaja yang dia suka (lihat perenggan 22 & 23).

(2) Sistem Torrens secara keseluruhannya menghalang cubaan perayu daripada mengkaveat kepentingannya melainkan dia mematuhi segala tuntutan ketat yang dikenakan. Kegagalan untuk memenuhi kehendak tuntutan tersebut tidak dapat diringankan dengan ekuiti. Namun begitu, ini tidak menghalang bidang kuasa mahkamah daripada membenarkan relief kehakiman di dalam tuntutan in personam di dalam undang-undang ataupun di dalam ekuiti (lihat perenggan 24).

(3) Mahkamah turut sama bersetuju dengan dapatan Mahkamah Tinggi bahawa amanah berbangkit telah wujud apabila perayu menyalurkan wangnya kepada responden pertama. Responden pertama, setelah memujuk perayu untuk memberikan wangnya, sepatutnya mendaftar perayu sebagai tuanpunya bersama hartanah tersebut di dalam konteks urus niaga, walaupun perayu berada di Jepun dan tidak menjalankan perniagaan. Responden pertama selanjutnya gagal untuk mematahkan kewujudan amanah berbangkit (lihat perenggan 25 & 26).

(4) Di dalam kes ini, walaupun amanah berbangkit telah wujud, saham perayu dalam milikan tersebut tidak berjaya dibuktikan. Tuntutan perayu terbatas kepada mendapatkan kembali jumlah sebenar yang disumbangkan oleh beliau kepada responden pertama. Sehubungan dengan ini, terdapat bukti yang boleh dipatahkan untuk mengurangkan jumlah yang dituntut kepada RM65,450 sahaja (lihat perenggan 30).]

Notes

For a case on held on trust for equitable co-owner, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2837.

For a case on whether sufficient evidence of intention to create resulting trust, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2478.

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

For cases on resulting trust, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2992–2996.

Cases referred to

Abdul Karim a/l PUK Mohamed Seeni @ Karim bin Sini v Tahir bin Yaacob & Anor [2004] 4 MLJ 373, CA (refd)

Chai Kim Chong v Barnwood Sdn Bhd [1994] 2 MLJ 56, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719, CA (folld)

Palaniappa Chettiar v Arunasalam Chettiar (No 2) [1962] AC 294 (refd)

Legislation referred to

National Land Code ss 323(1), 433B(1)(aa), (ab), (ac), (c), 433C

Manjit Singh Saini (Balbir Singh with him) (Harun Idris Yeoh & Partners) for the appellant.

Ng Pek Yuen in person

Goh Siu Lin (Goh Siu Lin & Bok) S Parameswary (Devan Mahalingam and K Geetha with him) (Tay, Tee & Nasir) Mohammad Al-Saifi Haji Hashim (Shasurraty Shamsuddin with him) (Attorney General's Chambers) for the respondents.

Suriyadi JCA (delivering judgment of the court):

[1] On 7 May 1996 Takako Sakao (f) (hereinafter referred to as the appellant), and one Kiku Toyatake as the second plaintiff, had filed Civil Suit S(1)–22–208 of 1996 (referred to as 'the writ') against one Ng Pek Yuen (f) (hereinafter referred to as 'the first respondent') at the Kuala Lumpur High Court. Later Phileo Allied (Malaysia) Bank Berhad, to be taken over by Malayan Banking Berhad intervened, to be added as a second defendant in 1998. On 11 October 2004 the third respondent ie Glamour Land Sdn Bhd intervened and was added as the third defendant.

[2] The appellant claimed against the first respondent for the following orders:

(a) a declaration that the first respondent held a piece of property under HS (D) 71434 for Lot No PT 3578 in the Mukim of Kuala Lumpur (hereinafter referred to as 'the property') as trustee for the joint beneficial interest of herself and the appellant;

(b) an order for sale of the property with the net proceeds to be distributed accordingly between the first respondent and the appellant;

(c) an injunction restraining the first respondent and/or her agents and servants from selling, transferring and/or in any manner dealing with and/or disposing on the property until the final disposal of the suit;

(d) specific and general damages;

(e) an inquiry be carried out of all accounts in connection with the business of the Japanese restaurant;

(f) an order that the first respondent do pay to the appellant all sums due to her from the property;

(g) damages for breach of contract and/or trust;

(h) damages for hurt feelings anxiety and mental distress;

(i) interest;

(j) costs to be taxed; and

(k) such further or other reliefs as the court may deem fit and proper.

[3] On 12 March 1998 Originating Summons S1–21–28 of 1998 (or the '*saman pemula*'), was filed by the first respondent against the Pendaftar Hakmilik Tanah Wilayah Persekutuan Kuala Lumpur, the appellant, and Manjit Singh Saini in order to remove caveats lodged on the property. On 13 October 1998 pursuant to an application Glamour Land was added as another defendant. Apart from the action against Manjit Singh Saini being struck out, the court also ordered that the *saman pemula* be heard together with the writ. On 22 February 2005, on application as per encl 76, the High Court allowed Malayan Banking to be the second plaintiff in the *saman pemula*, rather than as the fourth defendant. On 17 October 2005 the High Court decided against the appellant for both the actions, meting down the following orders:

(a) the second plaintiff's claim in the writ be dismissed with costs;

(b) the first plaintiff's claim (the appellant) from prayers (a) to (h) and (j) be dismissed;

(c) the first respondent be ordered to pay the appellant the sum of RM65,450 with interest at 8%pa from the date of filing the writ to the date of realisation;

(d) the appellant to pay costs to Malayan Banking and Glamour Land Sdn Bhd; and

(e) there be no costs to the first respondent.

[4] Being dissatisfied with the High Court's decision, the appellant appealed to the Court of Appeal hence the matters before us.

[5] The two appeals filed at the Court of Appeal against the respondents were appeals W-01–99 of 2005 in relation to the *saman pemula* (referred to as 'this appeal') and W-02–1236 of 2005 (hereinafter referred to as the 'second appeal') in relation to Civil Suit S(1)–22–208 of 1996 ('the writ').

The relevant respondent for these two appeals is Ng Pek Yuan with Malayan Banking and Glamour Land Sdn Bhd being secondary players. As the appeals were interconnected parties agreed that both appeals be heard simultaneously. Taken together the appeals could be described in this manner:

> The appellant's stance is that she contributed a certain amount of money to buy the property. She and the first respondent are co-owners and the latter holds her share under a resulting trust. The question to be resolved in relation to the appeal, pursuant to the writ, is to identify the amount contributed and whether indeed there was a resulting trust. If the answer is positive the appellant will be entitled to her percentage of contribution. The first respondent's stance as regards her *saman pemula* is that the caveats cannot be filed by the appellant as she has no caveatable interest let alone no authorisation has been obtained from the state authority. That being so the caveats must be removed.

[6] Before proceeding with the appeals, by consent of the appellant, the appeals against Malayan Banking in W-01–99 of 2005 and in the second appeal (W-02–1236 of 2005) were struck out with no costs here and below. The appellant also withdrew the appeal against the Pendaftar Hakmilik Tanah WPKL, and by consent without costs. As regards the costs ordered against the latter at the High Court, parties agreed that the decision would be deferred until the conclusion of the appeal.

[7] At the end of the appeals we made the following orders, namely:

(i) it was this panel's unanimous decision that the appeals be dismissed with costs (the effect would be that the caveat filed by appellant was ordered removed and that the appellant be refunded to the sum of RM65,450 only);

(ii) the High Court orders of these appeals be affirmed;

(iii) the deposits were ordered toward account of taxed costs; and

(iv) as agreed, and with appeal W-01–99 of 2005 now dismissed, costs made against the *Pendaftar Tanah* at the High Court was ordered to remain unvaried.

BACKGROUND FACTS OF THE APPEALS

[8] The appellant and the first respondent were friends and business partners at one point of time. As early as late 1991 the first respondent, also known as Mrs Connie Choong, together with the appellant who is a Japanese citizen residing in Japan, had intended to set up a Japanese restaurant in Malaysia. The idea soon crystallised into reality and a shop ie the property was acquired to house the restaurant. The property was secured by the first respondent on 6 March 1992, vide a sale and purchase agreement with one

Mr Lim, for a purchase price of RM950,000. A company called Ofukujaya Sdn Bhd was incorporated to run the Japanese restaurant, with the appellant holding 49% share in this company, and the first respondent holding a controlling 51% share.

[9] To finance the venture some monies were sent by the appellant from Japan to the first respondent. The appellant claimed that she had from time to time, not only contributed towards the share capital of the restaurant, but also towards the purchase price of the property. The alleged payments were as follows:

(a) RM150,000 on 31 December 1992 by way of telegraphic transfer to the first respondent;

(b) RM20,000 in April 1992 by cash to the first respondent;

(c) RM17,950 in August 1993 by telegraphic transfer to the first respondent; and

(d) RM26,660.48 from Kiku's money (the second plaintiff in the writ) held by the first respondent.

[10] The aggregate sum was RM214,610.48. Since the appellant and the first respondent did not have sufficient funds at that material time to pay for the full purchase price of the property, a loan was raised to finance the purchase. The lender was Perdana Finance Berhad. As security for this loan, a first legal charge was created in favour of Perdana Finance Berhad.

[11] Later, around the middle of 1994, the appellant discovered that the property was only registered in the name of the first respondent. To prevent the latter from dealing with the property, the appellant entered a private caveat which bore presentation No 13274/94 (*first caveat*) on the property in December 1994, in force until 23 July 1996. In March 1996, the appellant's solicitor had attempted to enter another caveat on the property (*second caveat*), but rejected by the Kuala Lumpur Land Registrar as it disclosed 'no caveatable interests'. This caveat was thus never registered.

[12] As stated above, on 7 May 1996 the appellant filed Civil Suit S(1)–22–208 of 1996 (the writ), against the first respondent. In July 1996, on the basis of this writ action having been commenced against the first respondent, the appellant entered the third caveat ie presentation 7267/96 against the property. The third caveat, though presented on 18 July 1996, was not registered until much later. Apparently it was held up by the land office for clarification of certain title number particulars and permitted to be registered later with retrospective effect. When caveat No 7267/96 was not reflected, after searches were made at the Kuala Lumpur Land Office, the

appellant lodged a *fourth caveat* ie presentation No 13038/96. In 2002, a fifth caveat was entered against the property, as caveat No 7267/96 had expired through effluxion of time.

[13] Unbeknown to the appellant, sometime in June 1996 the first respondent had entered into a sale and purchase agreement with Glamour Land Sdn Bhd, for the sale of the property. The latter then allegedly applied for a term loan founded on the security of the property. It transpired that as a result of caveat No 7267/96 and all the intricacies that went with it, the Kuala Lumpur Land Office had rejected the registration of the memorandum of transfer between the first respondent and Glamour Land, and the charge between the latter and the bank, presented on 23 September 1996.

TARGET OF THE APPELLANT

[14] The appellant's claim is only against the first respondent and not against Glamour Land or even Malayan Banking. Both these latter respondents are strangers to the agreement between the appellant and the first respondent as regards the property. The appellant's two main complaints are that in breach of the agreement between her and the first respondent, the latter had unlawfully registered the property in her sole name. The first respondent had also concealed that fact. And this want of registration of the appellant's name as a co-owner happened despite the request by the first respondent from the appellant for contributions towards the solicitors' fees, compensation payment to the vendor, quit rent, assessment and stamp duty involved in the purchase of the property, which the appellant promptly had contributed to. The above payments were in addition to the appellant's contribution towards the purchase price. The first respondent had represented in writing to the appellant that the property would be '*for our food business*' (RR 457–458).

[15] The registration issue apart, the appellant's next serious contention was that, sometime in mid-1996 the first respondent with mala fide intent, purportedly sold the property to Glamour Land for the sum of RM1,930,000 in an attempt to defeat her interest. The appellant had alleged that Glamour Land was not a bona fide purchaser and had colluded with the first respondent. It was further alleged that the owner of Glamour Land in fact was the husband of the first respondent. Glamour Land was averred to have attempted to create a legal charge on the said property in favour of Malayan Banking in order to defeat the appellant's interest.

ADDITIONAL CONTENTION OF THE APPELLANT

[16] The proposal to buy and share a building emanated from the first

respondent, resulting in the appellant contributing the above mentioned payments towards the purchase of the property. The first respondent was alleged to have consistently requested for her half share of payment towards the building; and the first respondent had admitted receiving the contribution. This half share issue is consistent with the first respondent's half beneficial interest in the property.

[17] The appellant submitted that, despite the appellant not having been registered as co-proprietor of the said property, in the circumstances of the case, a resulting trust had been created over the said property, entitling her to half share of the property.

THE RESPONDENTS' DEFENCE

[18] The first respondent contended that the monies given by the appellant amounting to RM169,500 were operating costs of the restaurant. Since the appellant and the first respondent's monies were insufficient to bear the operating costs, a loan of RM200,000 was taken from Perdana Finance Berhad. The operating costs were more than that sum. In fact RM366,567 was spent to start the restaurant, with the first respondent ending up paying for the other expenses.

[19] Malayan Banking alleged that, on the request of Glamour Land and pursuant to a letter of offer dated 4 July 1996, it had granted a term loan for the sum of RM150,000 to the latter, inter alia, to part finance the purchase of the property from the first respondent. By way of security for the term loan, Glamour Land had executed a first party legal charge over the said property, in favour of Malayan Banking.

[20] Prior to the presentation of memorandum of transfer and charge, Malayan Banking's solicitor had on 23 September 1996 conducted a search on the register document of title and the caveat register book, at the Kuala Lumpur land office. The said search revealed that the said property was free of encumbrances. Satisfied with that status the bank released the loan amount. On the same day Malayan Banking's solicitor presented the documents for registration. The land office on the other hand failed to register the aforesaid memorandum of transfer and memorandum of charge on the premise that a private caveat had been filed earlier by the appellant on 16 January 1996 as per presentation No 7267/96.

[21] Glamour Land had averred that by a sale and purchase agreement dated 21 June 1996, it had agreed to purchase the property from the first respondent on the terms and conditions as set out therein and that the aforesaid transaction was bona fide. It denied any collusion with the first

respondent to defeat the interest of the appellant over the property. Glamour Land admitted that in order to assist in financing the purchase of the property, it obtained a loan from Malayan Banking, and as security for the said loan, it was required to create a charge over the property. Glamour Land complained that it had suffered losses and damages arising from the lodgment of the caveats by the appellant.

OUR FINDING

[22] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 the Court of Appeal had stated that the onus was on the caveator ie the appellant in this case to establish that she has a caveatable interest. In that case the court had clarified that the National Land Code created three categories of interest that may be protected by the entry of a private caveat. These categories were derived from s 323(1) of the National Land Code and they read as follows:

> (1) the persons and bodies at whose instance a private caveat may be entered are:
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> (a) any person or body claiming title to, or any registrable interest in, any alienated land … or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
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> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).
>
> (2) ...
>
> (3) Any application under this section shall be accompanied by —
>
> (a) the prescribed fee;
>
> (b) the grounds, giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and ....
>
> (c) ...

[23] Despite the width of those categories, it was our view that the current interest of the appellant faced a statutory obstacle, which impediment she had failed to overcome. It is indisputable that the appellant had failed to obtain the prior written approval of the state authority as required under s 433B(1)(c) read together with s 433C of the National Land Code. Without that approval, eventhough beneficially entitled under the resulting trust over the property acquired by the first respondent, with no evidence adduced that

the dealing was prior to 1 January 1993 or her case falling under 433B(1)(aa), (ab) and (ac), her attempt to lodge any caveat must necessarily fail. The caveats must be removed.

[24] However inequitable it may appear outwardly, it must be understood that the Torrens system, which is the very foundation of the National Land Code, is a complete bar to the attempts of the appellant to caveat her interest unless all the strict demands are complied with. With the promulgation of the amended provision any failure to comply with the strict requirements cannot be tempered with equity. In spite of that it does not exclude the courts jurisdiction to grant judicial relief in a claim in personam founded in law or in equity.

[25] Having perused the trial judge's findings we failed to detect any error in his judgment and agree that in the circumstances of the case, a resulting trust was created when the monies were funneled to the first respondent. The appellant here had entrusted her contribution with the first respondent, expecting her share and contribution to be used for her benefit in the joint venture. The fact that she was in Japan, and away from the hub of the business, let alone the respondent had been the party who had successfully persuaded her to part with her money, the first respondent was expected to register her as the co-owner of the property within the context of the business venture (*Abdul Karim a/l PUK Mohamed Seeni @ Karim bin Sini v Tahir bin Yaacob & Anor* [2004] 4 MLJ 373). Whether expressed or implied, the appellant still retained her proprietary rights, never intending that her beneficial interest be taken away from her, and that the interest in the contribution to eventually revert to her when she demands it back. It must be understood that this was a business venture with profit being uppermost in everyone's mind; charity had no place in such a background.

[26] No evidence was adduced by the first respondent to rebut the creation of this resulting trust. The appellant's contribution was never established as a loan, proved for the benefit of the first respondent, contrary to law or public policy or provide any reason to rebut it as a resulting trust (*Palaniappa Chettiar v Arunasalam Chettiar (No 2)* [1962] AC 294). This resulting trust is a valid legal interest in law (*Malaysian Trust Law* by Mary George p 221).

[27] Up to this stage, be it the transfer of money, the running of the Japanese restaurant, or even the joint venture per se, the trust being in conflict with any law had yet to confront the appellant. Everything was above board. She was entitled to the benefits of the venture and protection of the law. In the event of any breach by the first respondent, the courts will certainly be at hand to render assistance to the appellant, as equity will not suffer a wrong to be without remedy.

[28] There was no evidence of any illegal intent on the part of the appellant when she agreed to the entrepreneurial undertaking, as proposed by the first respondent nor was any evidence adduced to establish that she was aware of any legal impediment, causing her share to be exposed and unprotected. Matters came to a head only when she discovered that she was not a registered co-owner of the property, but even that, only after a search was carried out. She later came to know too that the property was to be sold to Glamour Land, a company which was partly owned by the husband of the first respondent.

[29] At the risk of being repetitive it was at the phase when the lodgment of the caveats was in the process, that she faced a statutory wall, as she had failed to obtain the required authorisation from the State Authority. As said earlier, the appellant was caught by the restrictions in ss 433B(1)(c) and 433C of the National Land Code, with the former provision wide enough to cover her predicament as she is a non-citizen beneficiary of an alienated land. With the appellant's failure to comply with the above provisions, hence prohibited from having a caveatable interest under the National Land Code, the first respondent would be permitted to sell the property to whomsoever she wishes.

[30] Despite the often quoted statement that equity follows the law, and the appellant is not without remedy, she still has to establish her claim (*Chai Kim Chong v Barnwood Sdn Bhd* [1994] 2 MLJ 56). Here eventhough we were satisfied that a resulting trust had been created when the first respondent received the contributions from the appellant, but regretfully what her share was out of the value of the property, was not successfully established by the appellant. In such a circumstance the appellant's claim will have to be confined to recovery of actual sums of money contributed by her to the first respondent. Eventhough the first respondent failed to appear at the trial, and all allegations made against her were deemed to be admitted, there was sufficient rebuttable evidence to reduce the claimed sum to that of RM65,450 only.

[31] The oral and documentary evidence adduced by the appellant, had established that she had contributed a sum of RM65,450 towards the purchase of the property by giving or transferring monies to the first respondent. In fact this sum was clearly acknowledged by the appellant herself in a form of a written agreement dated 12 September 1994 made at a subsequent meeting between herself and many others, including the first respondent. In this document she had declared:

> I, Takako, only wish to record here that I have paid RM47,500 (being 5% of RM950,000.00) and RM17,950 (being my half share of the additional payment to the vendor) *in respect of the building*. The total amount is RM 65,450 (Emphasis added).

[32] The above sum was further reflected in the appellant's statutory declaration affirmed on 19 September 1994 when lodging the first caveat. She affirmed that she had only paid RM47,500 and RM17,950 making a total sum of only RM65,450 to the first respondent for the purchase of the property.

[33] Based on the above reasons this panel had unanimously dismissed these appeals with costs. The detailed orders have been laid down earlier as above.

Appeals dismissed with costs.

Reported by Andrew Christopher Simon